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Supreme Court of the United States

OCTOBER TERM A. D., 1906.

No. 395.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI.

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Counsel.

FILED OCTOBER 16, 1906.

(20,360.)

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In the Supreme Court of the United States

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States, and to the Honorable the Chief Justice and Associate Justices thereof:

The petition of Thomas M. Fields respectfully shows as follows:

1. That he is a citizen of the United States, and a resident of the District of Columbia; he has been a member of the bar of this court since 1896, of the Court of Appeals of the District of Columbia since its organization in 1893, and of the Supreme Court of the District of Columbia since 1885, and, until the charge in this proceeding, he was in good standing, and was in the active practice of law, and in the enjoyment of a substantial income therefrom; apart from this prosecution (which subjects your petitioner to both imprisonment in the penitentiary for five years and a large pecuniary forfeiture of commissions, costs and charges) he has never been arrested nor charged with crime of any sort, but has had the confidence and esteem of his fellowmen, and has been held by them to be, and was in fact, an upright, honest man of integrity and good character; he has received and properly disbursed hundreds of thousands of dollars in money during his career as a lawyer, and as such he has been intrusted with large property interests; but in this case, under Code D. C., section 841, he and Andrew A. Lipscomb, as chancery receivers, were jointly indicted on April 3, 1905, in the Supreme Court of the District of Columbia; a severance was had (R. 4) and on May 8, 1905, your petitioner alone was simply rail-

roaded to trial and infamous conviction at any cost, for the alleged crime of embezzlement of about $16,000 in money which had come into their possession on June 28, 1895; but this crime has not in fact been committed at all, and of it the said trial court was absolutely without jurisdiction; your petitioner was denied the necessary information as to the nature and cause of the accusation against him, he was denied a fair and impartial trial, the assistance of counsel, and the necessary time to execute or get the benefit of compulsory process for his witnesses; and he was also denied the inspection of vital public papers, as well as any reasonable time and facilities to prepare for trial or to make any affirmative defense whatever on the merits, while the then prosecutor and his then assistant exercised a license, especially as to evidence and argument, all to the intense and intended prejudice of your petitioner, and in defiance of his rights under the Constitution and laws; a few months later the said Lipscomb was tried on the same indictment, in the same court, before the same judge, on the same government proof, and by the same prosecutors, but, having been accorded the rights summarily denied your petitioner, he was promptly acquitted; on May 1, 1906, the judgment (R. 26-27) against your petitioner was affirmed by said Court of Appeals, and a motion of your petitioner for a rehearing was denied by that court on June 7, 1906, after the adjournment of this court; your petitioner simply seeks a reasonable chance to relieve himself of the said charge and forfeiture.

2. That in this case your petitioner has recently been allowed a writ of error by a Justice of this court, to which writ a full return (which has not yet been printed) has been duly made and filed herein; he is advised that the jurisdiction of this court on said writ of error may be questioned, and he therefore files this petition for the writ of certiorari, which this court is authorized to issue to said Court of Appeals under section 234 of said code, if its said judgment be final, to the end that if it shall be so found this court will then order its writ of certiorari to issue to said Court of Appeals, and direct the said return to the said writ of error to stand as the return to such writ of certiorari, in order that the said judgment may be reviewed, and justice done in the premises; and as a part hereof your petitioner hereby refers to the certified copy of the record of all of the proceedings in the courts below, made and filed in this case in return to the said writ of error, and also to his brief herein on the merits, in support of the questions presented hereby, as well as the many others which appear in the said record; and he also hereby refers to the memorandum, hereto annexed *ad finem*, concerning the allowance of the writ of certiorari.

3. That a primary question of controlling importance is whether the said trial court had any jurisdiction whatever of the offense alleged in this case—that is, of the alleged embezzlement by a chan-

cery receiver of money which had come into his possession long before Congress passed the statute upon which this prosecution is based, inasmuch as the statute includes only after-acquired property, and there is no other law or property whatever to support this proceeding; that this proceeding is the first of its kind ever instituted in this District, and is based exclusively upon the highly penal section 841 of the Act of Congress of March 3, 1901, "to go into effect and operation from and after" January 1, 1902—ten months in the future—and designed to establish a code of law for the District of Columbia; the said code consists chiefly of old laws carried forward, but section 841 is new, original, complete and exclusive legislation, and is the first law on the subject covered by it ever passed since the foundation of this District, more than 105 years ago; the money involved in this case is the proceeds of the sale of certain real and personal property, which property had come into the defendants' possession (R. 31) on November 6, 1894, and which money had come into their possession (R. 37) on June 28, 1895—almost seven years before said code took effect, and about six years before it was passed; by demurrer, motion in arrest, and numerous exceptions, your petitioner insisted that the trial court was absolutely without jurisdiction of this case, because said section 841, which is under the title "Offenses against Property," is rigidly restricted by its express descriptive terms and intent to such personal property of another as "may come * * * so coming into" a receiver's possession after it has taken effect, and it does not include the money which in this case had come (R. 37) into the defendants' possession long before—in short, Congress, without reference to any other section, has annexed to section 841 a specific description of the property of which the offense must be committed, and this description strictly limits the jurisdiction of the court to the offense of embezzlement of after-acquired property and excludes pre-acquired property, by its very words; the said action is exclusively prospective in all of its terms, and is in full as follows:

> "Sec. 841. EXECUTORS AND OTHER FIDUCIARIES.—Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

4. That the indictment (R. 1-2) charges in substance that on Nov. 23, 1903, Lipscomb and Fields were receivers under an order of the D. C. Supreme Court, dated Nov. 6, 1894, in Equity Cause No. 15907; that as such receivers they had possession of the sum of $15,974.07 in money of that value, which "being the property and moneys of The Washington Beneficial Endowment Association, a body corporate, had then and there come into such possession of them" as such receivers; and that on said Nov. 23, 1903, at the District of Columbia, they fraudulently converted the same to their own use, and thereby embezzled the same, against the form of the statute.

That the said indictment was originally in eight counts (differing chiefly as to ownership), four of which were eliminated by demurrer (R. 4-5) and three by verdict of not guilty (R. 70-71), leaving only the third count (R. 1-2) to support this judgment; that as aforesaid this indictment relates solely to money which had come into the defendants' possession long before the code, and this fact was made certain [R. 77] by the evidence (R. 37), which fixed the exact date when it came into their possession as June 28, 1895.

5. That both of the lower courts in effect concede [R. 77-78] that a strict construction of this statute, according to its words and grammatical arrangement, excludes pre-acquired property and jurisdiction of this case, but hold (34 W. L. R. 382, 383) that there is no reason [R. 78] why Congress should have made a distinction [27 App. D. C. 433, 440] between pre-acquired and after-acquired property, and therefore the statute is to be construed retrospectively to include the former—that is to say, the particular descriptive words used in section 841 are to be enlarged by the court, under the guise of construction, to include a class of wholly excluded offenses, simply because the court thinks Congress should have included them; this conclusion is purely judicial legislation enacted to meet the exigencies of this case, and it has been reached by forcing the interpolation of words [R. 78, "may have passed"] purposely omitted, by denying the plain effect of the unambiguous language of the statute itself, by ignoring the rule of strict construction of penal statutes, and that against constructive offenses, and that against retrospective construction which operates with particular force when, as here, a retrospective construction is neither required nor permitted but actually renders this law unconstitutional and void by reason of its forfeiture clause, which, if effective when so construed, and as construed in this case, operates conclusively and arbitrarily to forfeit and confiscate all of your petitioner's right or claim to commissions, costs and charges which had been duly and faithfully earned, to the amount of about $10,000 (R. 36) before the code took effect, and had been finally

adjusted and allowed by orders and decrees of the chancery court (R. 37, 48); the said conclusion, considering the clear language of the act, is both absurd and nonsensical, and it resolves any doubt or ambiguity in the statute against the accused; and both this conclusion and the method of reaching it, are in direct conflict with said Court of Appeals' own decision of Nov. 8, 1905, in Ohio National Bank *vs.* Berlin, 26 App. D. C. 218, and in direct violation of the rules of statutory construction which this court laid down in 1899 for the guidance of said Court of Appeals, in reversing its judgment in Hamilton *vs.* Rathbone, 175 U. S. 414, and which are also stated in United States *vs.* American Sugar Company, 202 U. S. 562, United States *vs.* Wiltberger, 5 Wheaton 76, France *vs.* United States, 164 U. S. 676, Bolles *vs.* Outing Co., 175 U. S. 262, United States *vs.* Harris, 177 U. S. 305, Sarlls *vs.* United States, 152 U. S. 570, and many other cases decided by this and other courts, and cited in your petitioner's brief herein on the merits.

6. That as the trial court was absolutely without jursdiction of the offense alleged in this case, for the reason stated, and as this court has jurisdiction as aforesaid to issue the writ of certiorari to the said Court of Appeals, and the plenary power of review over its said judgment, such writ should be granted if the said writ of error shall be found untenable, and your petitioner should not be put to further proceedings in *habeus corpus*, which this court would entertain on proper application, on the authority of Chapman *vs.* United States, 156 U. S. 211, Riggins *vs.* United States, 199 U. S. 547, *Ex parte* Coy, 127 U. S. 731, *In re* Nielson, 131 U. S. 176, *In re* Tyler, 149 U. S. 164, *Ex parte* Siebold, 100 U. S. 371, Mackey *vs.* Miller, 126 Fed. Rep. 161 (C. C. A.), and many other cases, because he would then have exhausted all of the ordinary remedies for review of said judgment.

7. That there is also involved in this case a question of profound importance, far-reaching in its effects, and of very frequent recurrence in all criminal trials in federal courts, concerning which there should be uniformity of decision of such courts, but as to which the decision of the Court of Appeals of the District of Columbia in this proceeding is directly contrary to that of the United States Circuit Court of Appeals for the Sixth Circuit in Mullen *vs.* United States, 106 Fed. Rep. 892, under substantially the same circumstances; and this question can be stated thus: In a criminal trial in a federal court, of a charge involving deep moral turpitude, where no testimony has been offered as to the previous character of the accused, does a presumption of good character exist in his favor, of which, on a request therefor, the jury should be instructed?

That the instant case was a criminal trial of a charge of embezzlement in a federal court, involving also a pecuniary forfeiture, where no testimony was offered as to the previous character of the accused

(for want of any reasonable time and opportunity whatever to offer any testimony or to make any affirmative defense at all on the merits), and your petitioner asked the court to instruct the jury (R. 63, Pr. xxv, Ex. 44) "that the law presumes the defendant to be an upright, honest man of integrity and good character;" but the court not only refused to give this prayer, but also denied any instruction or charge whatever on the subject (R. 65-70, Charge).

That in the Mullen case (106 Fed Rep. 892. Indictment for election frauds. Before JJ. Day, Severens and Lurton. Opinion by Mr. Justice Day) this question was carefully considered and emphatically answered in the affirmative, while in this case (reported in [27 App. D. C 433, Record 75] 34 Washington Law Reporter 382) it was hastily and illogically answered in the negative. The sharpness of the conflict between these appellate federal courts, on the same question and under substantially the same circumstances, is made more apparent by the following:

MULLEN CASE.

Syllabus (p. 892): "In a criminal trial in a federal court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed."

Opinion (p. 894): "Does such a presumption exist? We fail to find any difference of opinion in the well recognized text writers upon this subject. All assert that a presumption exists in favor of the accused in the absence of testimony that he had a good character previous to the time of the alleged commission of the offense. It is true the government may not attack the character of the accused until he puts it in issue by affirmative testimony on his part. He is not obliged to do this, but may, if he

FIELDS CASE.

Syllabus (p. 382): "An instruction that 'the law presumes the defendant to be an upright, honest man of integrity and good character,' is properly refused where no evidence of good character was offered by defendant."

Opinion (p. 386): "The defendant offered no evidence of good character. * * * The court is not required to give an instruction on anything that has not been put in issue. All that the defendant was entitled to was a charge upon the presumption of innocence, and the necessity of the government to overcome that presumption."

(Decided May 1, 1906).

(Record p. 83 27 App. D. C. p. 448).

sees fit, rest upon this presumption raised by the law.

* * * * * * * * * * *

"It is true that there are cases which hold that, where there is no testimony on the subject of character, the court is not obliged to say anything to the jury, either one way or the other. But if the presumption exists in favor of the accused, it can not be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

(Decided Feb. 12, 1901.)

That the said opinion is also in conflict with the emphatic and correct admission of the government counsel in this case in the Court of Appeals (Brief for U. S., p. 35) that—

"Unquestionably it is the law that in the absence of any testimony concerning the character of a defendant, the law presumes him to be a man of good character."

That this question has never been directly decided by this court, but the great weight and importance of proof of the good character of the accused, under a charge of *crimen falsi* or species thereof, has been expounded in Edgington *vs.* United States, 164 U. S. 361 (indictment for making false deposition in aid of claim for pension); the general importance of this question, its frequent recurrence, its particular importance in the instant case, and the conflict of decision of appellate federal courts concerning it, warrant this court in issuing the writ of certiorari for the purpose of determining this and other questions presented by this petition and the record in this case, to the end that uniformity of decision in the federal courts may be established concerning the same; there is nothing of higher

importance in law or life than the good character of a man; the court was bound to give a proper instruction on this subject; the Court of Appeals D. C. either did not read at all, or else it utterly misconceived—as it has (R. 83) certainly mis-stated—the Mullen decision; the opinion of the Court of Appeals D. C. also conflicts on this point with the decision of its predecessor, the Supreme Court of the District of Columbia in General Term, in United States *vs.* Neverson, 1 Mackey 153, 158 (indictment for murder), and also with its own previous decision of Jan. 5, 1906, in Posey *vs.* United States, 26 App. D. C. 302, 307 (indictment for arson), as well as with the decisions of other courts; and this question is of unusually vital importance in this case, in view of the base nature of the charge and the utterly unwarranted attacks on your petitioner's character, made both by the trial judge (R. 57, 58-59, comments as to defendant's prayers) and by the then prosecutor and his then assistant in their violent and intensely improper arguments to the jury (R. 63-65), which said judge affirmatively approved.

8. That another question of general importance, and of particular importance in this case, is the duty of a federal trial judge to refrain from comments which weaken or destroy the proper prayers of the defendant in a criminal case, as laid down in Burton *vs.* United States, 196 U. S. 283, 307; that in the present case, at the close of all of the evidence, "the government and the defendant handed up their respective prayers for instructions, the defendant's counsel stating to the court that the determination of what of his prayers would be offered would depend on the court's ruling on others, as the court would see from the drafts of the prayers handed up. The court then took a recess" of forty-five minutes (R. 57).

That the defendant's counsel handed up twenty-seven separate prayers, each on a separate sheet of paper, lightly held together with a mere temporary slip fastener; that the record (R. 57) proceeds:

"After recess the following occurred: The Court: Mr. Stenographer, you may note that a series of 27 special prayers were submitted to the court, fastened together by counsel for the defendant. The court has exmined them sufficiently to ascertain that some are improper statements of law without taking the entire series into view, and they are refused. Mr. Baker: We note an exception to the refusal of each prayer. We note an exception separately to the refusal of each prayer offered. I wish your Honor to understand that we do not offer the prayers as a series. We offer each one separately, and ask your Honor's ruling on each prayer: The Court: I overrule them. They are put together as a series, and as a series are refused. Mr. Baker: Then I offer prayer No. 1. But I suppose the government should offer their prayers first. I would like to have an exception to the court's refusal to consider the prayers.

"Thereupon the said prayers were handed to the clerk, and filed in open court endorsed by the court as follows: 'This series of instructions is refused as a series and ex. Wright.'"

That all of the foregoing took place in the presence of the jury; that the court then ruled on the government's prayers (R. 57-58), and, without any foundation whatever in fact to support or warrant the foregoing and following comments at once proceed in the jury's presence as follows (R. 58-59):

"The Court: I should perhaps make it clear right here and now, that it is a question which ought to be settled whether it is appropriate in this jurisdiction for counsel to submit a series of all the way from twenty-seven instructions up to an indefinite number. Some twenty-seven prayers have been submitted here in a series, and in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial but to save some possible point for reversal in another court. I started to examine these prayers during the recess, and the time afforded did not suffice for the examination of a fifth of them. For me to examine this series of prayers in detail would require the postponing of this trial over two or three days. As before said, they are offered in a series, and as a series they are refused, because some of them are improper statements of law. Mr. Baker: If your Honor please, I will state that the prayers are not offered in a series. They are not offered for the purpose of having—. The Court: You will not state that, either. What I say controls that. Mr. Baker: Then I note an exception to the court's ruling, and I ask to offer these prayers separately. The Court: I will not permit them to be offered separately in the form in which they are. Mr. Baker: Then I note an exception to the ruling of the court."

Because (*a*) the prayers had not then been offered at all, as the statement of counsel (R. 57) when handing them up expressly shows; (*b*) they were not offered as a series; (*c*) they were not offered "to save some possible point for reversal in another court;" (*d*) it requires but six minutes to examine the prayers "handed up;" (*e*) none of them contained "improper statements of law;" (*f*) we had a right to state, in the presence of the jury, the purpose for which the prayers were offered, and to relieve ourselves of the court's erroneous charge against us; (*g*) we had a right to offer our prayers separately; (*h*) the prayers were handed up with a mere temporary slip fastener holding them lightly together; (*i*) the said statement was in effect that the defendant would be convicted, as there could be no reversal without conviction; (*j*) it was an expression of opinion that defendant was guilty; (*k*) it assumed his guilt; (*l*) it was in effect that he considered himself guilty and was merely trying "to save some possible point for reversal in another court" of certain conviction; (*m*) it was unwarranted, unfair, unlawful, and

intensely prejudicial to the defendant; (*n*) it was necessarily controlling on the verdict of the jury, for it was never withdrawn nor modified in any way, but was accepted by them with the utmost deference (R. 58-59, Ex. 33).

9. That another question of general importance is the limit of the prosecution's proof of the alleged fraudulent conversion in proceedings against fiduciaries for embezzlement, under indictments giving no particulars of the alleged conversion and fraud, and in the absence of any statute dispensing with such particulars; the special question in this case being whether the trial court erred in receiving evidence of ninety-two (92) unconnected, separate, and distinct items, acts, or transactions, each claimed to be in itself a substantive act of embezzlement and received in evidence as such, under the indictment alleging but a single act on one certain date, (*a*) "because the indictment alleges but one offence, and the government should not be permitted to prove any number of alleged acts of embezzlement under an indictment which alleges the embezzlement of a lump sum on a particular day;" (*b*) because 43 of said acts or items preceded the code and the statute of limitations; (*c*) 77 of them involved private checks and certificates of deposit which were materially variant from money alone alleged in the indictment; (*d*) no plan or system was averred or claimed or proved; (*e*) no intent is alleged; (*f*) no election was made by the prosecution; (*g*) none of said acts was shown to be an offense; (*h*) 20 of said items postdated the indictment date of offense; (*i*) five of said acts occurred beyond the District of Columbia; and (*j*) the law elected the act, item, or transaction first proved as that alone on which the Government could rely (R. 38-41, Ex. 14, R. 69-70, charge that jury may convict of all).

That in connection with this question there are also involved the further questions as to the essentials of the proof of conversion and fraud required under said section 841, and what acts it makes criminal; the evidence of the alleged fraudulent conversion in this case is in substance (R. 37-41) merely that the defendants (1) received the money, (2) deposited it in banks, and (3) drew it out of banks, without more; except that in one instance, concerning a certain check (R. 40), it was shown without any contradiction (R. 54-55) that your petitioner cashed it at bank, and at once delivered $1,000 thereof in money to his co-receiver Lipscomb in the presence of the witness Mead, but there was no proof whatever of any improper purpose, or of any purpose, for which your petitioner so delivered the said money; and as to this very item, the ruling of the trial court (R. 53-54) on the government's objection and in the jury's presence, and the opinion [R. 83] of the Court of Appeals (34 W. L. R. 382, 386) in its attempt [27 App. D. C. 448] to do the impossible, viz:

to point out the particular act, item, charge or offense (if any) of which the jury convicted, are as follows:

TRIAL COURT.	COURT OF APPEALS.
"It is quite clear to me that if you charge a receiver with embezzling one thousand dollars, it means that he wrongfully converts it to his own use. If he shows that he did not wrongfully convert that thousand dollars to his own use, but gave it to his co-receiver, who, under the law, was entitled to have possession of it, that is an absolute defense to that item."	"There being no single circumstance tending to show that it was a mere irregularity without intent to do wrong, the jury might well have considered the act, to that extent, not only a wrongful, but also a fraudulent conversion of so much of the fund."

That in this case the said Court of Appeals [R. 79, 80, 82, 83] has enounced and applied (34 W. L. R. 382, 384, 386) the novel, false, radical, dangerous and impossible doctrines that—

Page 386: [R. 82, 83] (*a*) On the trial of one of two joint receivers, on the charge that he has fraudulently converted the trust fund to his own use, and thereby embezzled the same, it is sufficient evidence of embezzlement to convict him simply to show that they drew a joint check (R. 40) for a small part of the fund and he cashed it at bank (R. 54) and delivered the money to his co-receiver (R. 55).

Page 386: [R. 83] (*b*) Such evidence casts the burden on the accused "to show that it [such delivery] was a mere irregularity without intent to do wrong," and, if he does not so show, the jury may well consider "the act, to that extent, not only a wrongful, but also a fraudulent conversion of so much of the fund," tho the trial court tells the jury the very contrary, and the statute requires a fraudulent conversion to his own use.

Page 384: [R. 79, 80] (*c*) If one of two joint receivers permits the trust fund or any part thereof to go into the manual possession of his co-receiver for the sole purpose of bona fide investment in certain safe securities, and the said fund never came into the exclusive possession or control of the former, nevertheless he is *ipso facto* guilty of embezzlement thereof.

Page 384: [R. 80] (*d*) One of two joint receivers cannot, even with the authority of his co-receiver (R. 30), act for both in any emergency or under any circumstances, in receiving (R. 40) or disbursing the trust fund or any part thereof, and if he does so act he is *ipso facto* guilty of embezzlement thereof.

10. That another question of importance is whether section 860 of the Revised Statutes of the United States applies to the Supreme Court of the District of Columbia, and to certain papers put in evidence in this case; with the equity cause 15907, mentioned in the indictment, three others (to each of which your petitioner was a party defendant) were (R. 48) consolidated; your petitioner was required to appear before the said court and the auditor thereof, as a witness, a party, and a receiver in said four causes, and as such, at three different times before said code, was compelled to prepare and produce three certain reports; in this proceeding, and over his objections and exceptions, these reports were given in evidence and used against him as admissions (R. 34); as to them the said Court of Appeals [Record 81] says (34 W. L. R. 382, 385): "The several receivers' reports showing their account and the possession of the balance charged in the indictment, were not only shown to be papers belonging to the record of the equity suit, but defendant's signature thereto was proved;" the said trial court is a court of the United States, and this proceeding involves both a charge of crime and a pecuniary forfeiture; the said section 860 R. S. is in full as follows:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

11. That another question of grave general importance, and of particular importance in this case, involves the extent (if any) to which a federal trial court can lawfully and beyond review deny the accused in a criminal case the rights guaranteed him by the sixth amendment to the federal Constitution and by the laws; the said Court of Appeals has decided this case on the theory that it was "the trial of a closely contested" case [R. 84] and "a long and hotly contested trial" [R. 82], but while in form it lasted one week, yet in fact it was actually in progress only eighteen hours, and was practically an *ex parte* trial of the government's case, with no reasonable time or opportunity whatever to the accused to prepare for trial, nor any reasonable chance whatever to make his affirmative defense on the merits, tho as matters of fact (which your petitioner was prevented from proving) the alleged offense has not been committed at all, many, many orders to pay out or invest were passed in said equity cause at various times and promptly obeyed; two such payments were ordered (21 App. D. C. 344, 369) by said Court of Appeals itself (R. 39) and obeyed; all checks drawn and payments made under such orders were offered and received [R. 38-41] in evidence in this case as proof

of the embezzlement by your petitioner of the moneys represented by each; the receivers' accounts have long since been finally settled, and closed as to all matters except the said forfeiture; that the said money never was converted to his own use nor embezzled by your petitioner; yet this judgment stands against him simply because the trial court usurped jurisdiction of the alleged offense, and summarily denied him any chance at all to make his defense on the merits, and because his other rights were grossly violated, as shown by the record in this case, all of which the said Court of Appeals has approved in accordance with its policy not to disturb judgments against the accused in criminal cases.

12. That the said indictment (R. 1-2) was filed on April 3, 1905; your petitioner was arraigned and pleaded not guilty on April 17; on April 20 (R. 2-4) he withdrew his plea and demurred; his demurrer was heard and determined (R. 4-5) on April 28, and was sustained as to four counts and overruled as to the other four; he at once gave notice (R. 11) in open court that he would apply to the Court of Appeals (which was not then in session) for a special appeal from that part of the order overruling his demurrer, on the reconvening of that court on Tuesday, May 2, which he did, but his application was denied (R. 11) later in the same day; on Wednesday, May 3, he filed his motion and affidavit (R. 5-6) for an order for a commission and letters rogatory to take the testimony of three material non-resident witnesses, two of whom were in New York city, and the other in London, England, and on Thursday, May 4, his motion was (R. 7) granted; section 922 of said code gave him the absolute right to such commission in this case, and section 1058 thereof gave him the like right to such letters rogatory; the government had ten days to file its cross-interrogatories; on Saturday, May 6, before 12 o'clock noon (R. 11), your petitioner's interrogatories under the said order for commission and letters rogatory were duly filed in the clerk's office and copies were served on the then prosecutor; the said trial court was not in session on May 5 and 6; no cross-interrogatories were ever filed; the commission and letters rogatory were never issued; but, over your petitioner's earnest protest and exception, he was forced to trial (R. 29) on Monday morning, May 8, 1905, and was thus entirely deprived of the testimony so sought; he was even unable (R. 18) to get service of process on two important local witnesses, and was also deprived of their testimony.

13. That on Thursday, May 4, 1905, your petitioner filed his motion and affidavit (R. 7-8) for a bill of particulars under the said indictment, which is exceedingly (if not fatally) loose and general in its allegations, and gives no information or specifications as to the nature and cause of the accusation sufficient to enable the accused to know what he must be prepared to meet on his trial, and he

noted this motion for hearing on Monday morning, May 8, at 10 o'clock, and duly served copies on the then prosecutor.

14. That about two months before the alleged trial of this case the then prosecutor removed from the clerk's office of the trial court to his own office, and there kept in his own close custody, all of the original papers and records in equity cause 15907, mentioned in the indictment, and so retained them until, during and after this trial; during the trial he brought them into court in a box, and took them back to his office at adjournment; your petitioner and his counsel were denied inspection [R. 14-15, 16, 28-29, Ex. 1, 23-24] of them in the place where the law required them to be, tho they were public records and of vital importance; on Thursday, May 4, 1905, your petitioner filed his motion and affidavit (R. 9) for an order requiring the then prosecutor to return these papers to the clerk's office for inspection, where they belonged, and noted (R. 10) this motion for hearing on Monday morning, May 8, at 10 o'clock, and duly served copies on the then prosecutor; a rule (111) of the trial court, adopted some years before this proceeding, imperatively forbids such removal of such papers, and section 556 of said code declares them to be public records and that they "shall be open to the public for inspection free of charge," and section 844 thereof punishes such removal by fine or imprisonment, or both.

15. That on Monday, May 8, 1905, your petitioner filed his motion, and the affidavits (R. 10-16) of himself and his counsel, for a continuance "for a reasonable time," your petitioner's affidavit reciting the foregoing facts, and also the many consultations day and night between the petitioner and his counsel; the materiality and details of the testimony of his non-resident witnesses; the immediate retaining of his counsel; that he has a good and valid defense, the nature of part of which will require examination of an elaborate account and a mass of papers, many of which have become intermingled, through no fault of his, with a large number of others, which it will take some time and labor to find; that various proceedings at law and in equity and in other courts are involved, some of which are intricate, but essential to be understood by his counsel; that the prosecutor has had all of the material papers and records in Eq. 15907 in his exclusive possession in his office ever since the indictment was returned, if not longer; that the accused and his counsel cannot properly prepare for trial without opportunity freely to inspect said papers and records where they belong, which opportunity they had not had; that another obstacle was the prosecutor's order to the Trust Company not to show the accused or his counsel or give them any information about certain material checks, certificates and accounts, and the prosecutor's request for delay on their application to him for permission to see the same; that the preliminary proceedings have occurred with such unusual haste and rapid-

ity as to take up all their time, and "reasonable time and opportunity are now required to prepare the case for trial on the facts; that affiant's counsel do not yet know of the material facts or the details of such facts in this case, as neither affiant nor they have had any reasonable time to collect them or the parol and documentary evidence to support them;" that the accused has been compelled to attend to calls for papers and information required by local courts in other cases; that he has given an average of fifteen hours per day to this case, and sometimes twenty-four, and twice had to be out of the city about it; that if his New York witnesses were summoned here it would require some short time for them to produce the documentary evidence required; and in conclusion "that this application for continuance is made in good faith, and not for the purpose of delay; and that this defendant desires a trial as soon as he reasonably can prepare for it;" that this affidavit for continuance is fully supported by those of his counsel, Messrs. Baker and Walker, saying also "that they are not prepared for trial of this case on May 8, 1905, although they have devoted all the time and attention to it that they reasonably could; that they have exercised unusual diligence in this cause, and a reasonable continuance is absolutely necessary in order to prepare properly for trial; and that without such continuance they can be of no substantial service to the said defendant on a trial on May 8, 1905."

16. That on said Monday morning, May 8, 1905, your petitioner's said motions were denied with harsh brevity (R. 28-29), and he was at once forced to trial in an utterly unprepared and helpless state, both of himself and his counsel, as shown by the record of the alleged trial; and in argument, among many other intentionally improper remarks (R. 63-65), the then assistant prosecutor mockingly said to the jury (R. 65) that your petitioner's "counsel have day after day stood in this court like phonographs, the passive mouthpieces of the defendant, who has conducted his own defense."

That the necessary effect of the foregoing rulings was to deprive your petitioner absolutely of every right guaranteed him by the said sixth amendment, but the said Court of Appeals holds that there was no error whatever in the premises, and that they were all matters of discretion with the trial court [R. 77-80].

17. That bank ledger entries of sixty-one checks and thirty-seven of the original checks were offered by the prosecution and received in evidence (R. 38-41) in this case, each as proof of a distinct, substantive act of embezzlement by your petitioner, when in truth and fact many of them were drawn and delivered under specific orders of the chancery court in said Equity 15907, and others under general orders thereof, all of which orders the then prosecutor had in his possession during the trial, among said removed papers and records; many of these orders directed single payments, and some, many;

yet each and all of these ledger entries and checks were sent to the jury as evidence of separate and distinct embezzlements by your petitioner of the various sums represented by each and all of them, and your petitioner was denied the opportunity to produce and prove such orders, and to explain the purpose of and authority for each check, which he could have done fully, if he had been accorded the necessary time and facilities; and sixteen (R. 38) certificates of deposit were given in evidence, and fifteen withdrawals (R. 38-39) were shown in evidence, each as proof of a distinct, substantive act of embezzlement; no election was ever made by the prosecution among these ninety-two items, acts or transactions, but such election was not only refused by the trial judge when asked by your petitioner to compel it (R. 41), but he also charged the jury (R. 69-70) that they could convict of all 92, although, as aforesaid, 43 of them preceded the said code and the statute of limitations (three years) and 77 of them consisted of private checks (R. 38-39) and certificates of deposit (R. 38) which were materially variant from money (*sic*) alone alleged (but not further described) in the indictment (R. 1-2); that as a matter of fact, said receivers, as such, had three separate accounts in two banks other than the accounts and banks mentioned in the evidence in this case; and that solely by the error of the bank, and wholly without the fault or design of said receivers, certain of said certificates and accounts inadvertently omitted the word "receivers" (R. 38-39), as all deposit slips were made up by clerks of said bank (R. 39), and not by the receivers. ["Said ledger entries show the dates and amounts of deposits and payments, but not the dates of checks or the payees or endorsers." R. 39].

18. That while the said indictment (R. 1-2) in form charges your petitioner with the offense of embezzlement of a certain single sum of money on a certain day, no evidence whatever was offered to prove this charge as laid, as the record expressly recites (R. 40); in argument to the jury, based upon no evidence whatever, the then prosecutor and his then assistant expressly charged (R. 63-65) your petitioner with (1) being a common thief, (2) depositing these trust funds to his private bank account, (3) forgery, (4) treating people as a physician, (5) "trying to break into" the medical profession, (6) mistreating his clients as a lawyer, (7) posing under an assumed name, (8) being a fugitive from justice, (9) not even trying "to prove a good reputation," (10) conducting his own defense, (11) being a lawyers, and (12) stealing dead men's money from widows and wards; it is absolutely impossible to tell from this record (and your petitioner does not know, and never has known, and perhaps never will know) of what he has been convicted, and if of any one or more of said ninety-two alleged acts of embezzlement, of what one or ones; or whether all of the jurors agreed on the same thing; or what of the trial court's contradictory rulings were followed by the jury;

that in its opinion in this case [R. 75-85] the Court of Appeals assumes (34 W. L. R. 382) as facts certain material matters not in existence nor in this record, and certain others in direct conflict with the record, and ignores and misconceives and misrecites facts shown by this record, especially in those parts of its opinion relating to inspection of the equity papers [R. 78], continuance [R. 78-80], ownership [R. 80], corporate existence [R. 80-81], conversion [R. 82-83], and arguments of the [R. 83-84] prosecutors [R. 63-65]; and it has decided this case without regard to the theories of the prosecutors and the trial court, and the rulings of the trial court on the proof and prayers and in its charge to the jury, but in some respects in direct conflict therewith, especially [R. 80] as to the effect of the annulment decree [R. 33] on ownership (R. 61, Pr. XII), the effect of the witness Mead's testimony (R. 54-56) on conversion [R. 82-83], etc; that the record shows throughout the most inexact administration of justice, and the grossest injustice to your petitioner, which have resulted in his conviction of a base crime that has not been committed, nor proved at all, in a court that was absolutely without jurisdiction of the offense alleged; the said Court of Appeals has utterly ignored some of the most important points made and relied upon by your petitioner in both the trial and appellate courts, and it has in various instances stated only the minor facts of your petitioner's contentions, denied them, and left the major unnoticed, so that its said opinion does not fairly state or represent the case made by the record, but is a familiar alien presentation thereof.

19. That in this case the appellate court holds [R. 80, 81] that "The Washington Beneficial Endowment Association, a body corporate," named in the said third count of the indictment (R. 1-2) as the owner of the said money, was, at the time of the alleged conversion (whenever that was), both such owner and body corporate; but in 1896 the Supreme Court of the District of Columbia, in the said equity cause 15907, on plenary proof decided directly and in express terms (R. 52-53) that it was not such owner after, and that it was dissolved as a body corporate on, August 9, 1894; that court reiterated this ruling (R. 35-36) in the same case on (R. 37) June 7, 1901; the first ruling was affirmed, and the opinion of said chancery court was adopted in full as part of its own opinion, by said Court of Appeals (R. 52-53) on March 1, 1897 (10 App. D. C. 316, 338, 342-343, 357-358); the second ruling was also affirmed by said Court of Appeals on March 3, 1903 (21 App. D. C. 344, 353-355, 367), but the decree was reversed on another point (368-369), and the court said (p. 367): "The Endowment Association • • • has gone out of existence."

That the uncontradicted record evidence in this case (R. 30, bill; 33, decree; 35-36, Auditor's reports; 44-45, deed; 47, decree; 52,

opinion of Judge Cox; 53, opinion of Court of Appeals) and the parol testimony show affirmatively that said Association's alleged ownership and corporate existence both ceased absolutely on August 9, 1894; and that on and after said date the Association's vendee, The Commercial Alliance Life Insurance Company, a body corporate, of New York, and later its receiver William T. Gilbert, became and were the owners until the anulment decree (R. 33) of June 27, 1896, in behalf only of said Association's creditors, from which time the distributees named (R. 35-36) in the sixth count of the indictment became and remained such owners, and as such they have in truth and in fact received the money mentioned in this indictment, as ordered by the final decree (R. 47-48); and your petitioner verily believes that if his conviction had been based upon any one of the other remaining three counts of the indictment the said Association would not have been held to be either the owner or a body corporate.

That the said trial court instructed the jury (R. 61, Pr. XII) that the said annulment "decree of the 27th of June A. D. 1896, revested no title to the real estate that was sold by the receivers, or to the proceeds thereof, in the Washington Beneficial Endowment Association;" and there was no contention whatever that its ownership did not pass absolutely to its said vendee in 1894 by its deed that was set aside two years later by the said decree [R. 33] in behalf of its creditors only, nor that it afterwards ever regained or held such ownership otherwise than under and by virtue of said decree, but it was claimed strenuously that it did regain the ownership of the proceeds by force of the said decree.

20. That another question of general importance is whether the omission in an otherwise regular bill of exceptions to recite in terms that it (R. 28-71) contains the substance of all the evidence offered by the government is fatal to its being so taken in the appellate court; that the Court of Appeals [R. 82] holds (34 W. L. R. 382, 386) that this bill is fatally defective for such omission and "can not be so taken [to contain the substance of all the evidence offered by the government] because it is apparent from the charge of the court that certain letters of the defendant were offered," etc., "and the same are not recited or mentioned in the bill of exceptions;" but the letter is in fact twice recited and mentioned in the bill (R. 53, bottom, and R. 64, bottom); the ruling of said court that this bill is fatally defective for said omission is in direct conflict with Clyatt *vs.* United States, 197 U. S. 207; its ruling that the charge controls the bill is in conflict with the decisions of this and other courts, and with its own prior ruling in Gassenheimer *vs.* United States, 26 App. D. C. 432, 447; and as to these rulings there should be uniformity of decision in the federal courts.

That the bill of exceptions is regular and does in fact contain and it truly recites the entire substance of all of the evidence offered by the government in any wise connected with and having relation to the exceptions or any of them, and it was so stipulated and agreed in writing in the trial court by the then attorney for the government.

21. That the said indictment (R. 1-2) is fatally defective in substance in that it omits the particulars of the alleged receivership and fraud and conversion, and gives no description of the property or money involved; that these (R. 1-4, demurrer, R. 19-20, motion in arrest) and many other questions of importance are presented by this record, and considered in your petitioner's brief herein on the merits, but it would unduly prolong this petition to recite them; and being advised that enough has been shown hereby to entitle your petitioner to the writ of certiorari if the said writ of error shall be found untenable, in such event he humbly prays as follows:

PRAYER.

That the writ of certiorari may be issued out of and under the seal of this court, directed to the said Court of Appeals of the District of Columbia, commanding that court to certify and send to this court, on a day certain, to be therein designated, a full, true and complete transcript of the record and of all proceedings of the said Court of Appeals, to the end that this cause may be reviewed and determined by this court, as provided in said section 234 of said code; that the said return to the said writ of error herein may then be ordered to stand as the return to such writ of certiorari; that your petitioner may have such other and further relief or remedy in the premises as to this court may seem just and proper, and in conformity with the said act; and that the said judgment of the said Court of Appeals in this case, and every part thereof, may be reversed by this court, and the cause remanded with the directions proper in the premises.

And, as in duty bound, your petitioner will ever pray.

THOMAS M. FIELDS.

HENRY E. DAVIS,
JOHN C. GITTINGS,
FRANK J. HOGAN,
Attorneys for Petitioner.

JURAT.

DISTRICT OF COLUMBIA, ss:

Thomas M. Fields, having been first duly sworn, deposes and says that he has read the foregoing petition by him subscribed; that he

knows the contents thereof; and that the matters and things therein set forth are true.

THOMAS M. FIELDS.

Subscribed and sworn to before me this 13th day of October, A. D. 1906.

BESSIE B. SHEEHY,
Notary Public, D. C.

[NOTARIAL SEAL.]

MEMORANDUM.

Code D. C., section 234, which is simply the Act of March 3, 1897, carried forward, provides as follows:

> "In any case heretofore made final in the court of appeals it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to said Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to said Supreme Court."

This Act is in substantially the same language [as to certiorari] as section 6 of the Act of March 3, 1891, establishing the federal Circuit Courts of Appeals.

In the following criminal cases this court has granted writs of certiorari under this Act to the Court of Appeals of the District of Columbia, and reversed its judgments: Winston *vs.* United States, Strather *vs.* United States, and Smith *vs.* United States, all reported in 172 U. S. 303, and 171 U. S. 690 (in each of which the only question was the construction of the Act of Congress giving juries the right to render qualified verdicts in capital cases.) Cadarr *vs.* United States, 197 U. S. 475 (in which the only question was the construction of Code D. C., section 939, concerning abandonment of prosecution of criminal cases for failure of the grand jury to indict or ignore within nine months).

The instant case involves several questions of the same nature and of equal importance, and others of much greater gravity, as is shown by our petition for the writ of certiorari. These questions are fully discussed in our brief on the merits.

The practice of filing a petition for the writ of certiorari, if there be any doubt as to the juriadiction of this court, where the case is here on error or appeal, was followed and approved in Security Trust Co. *vs.* Dent, 187 U. S. 237, 239, Burton *vs.* United States, 196 U. S. 283, 295, and Whitney *vs.* Dick, 202 U. S. 132, 134.

The writ of certiorari will be granted (1) in order to secure uniformity of decision, or (2) where questions of imporatnce are involved. Forsyth *vs.* Hammond, 166 U. S. 506, 512, 514, 515. American Construction Co. *vs.* Jacksonville Ry. Co., 148 U. S. 372, 383.

Lau Ow Bew *vs.* United States, 144 U. S. 47, 58. Hubbard *vs.* Soby, 146 U. S. 56, 60. United States *vs.* Rider, 163 U. S. 132, 139. *In re* Woods, 143 U. S. 202, 206. Columbus Watch Co. *vs.* Robbins, 148 U. S. 266, 269, 270.

Our petition not only shows direct conflict of opinion between appellate federal courts, on the same serious questions, but also presents a grave question of the jurisdiction of the trial court, and other questions of importance, some of which are far-reaching in effect and of constant recurrence.

The writ of certiorari is also granted in contempt cases, in the absence of any other adequate remedy, because such judgments are not reviewable here on error or appeal. *In re* Tampa Ry. Co., 168 U. S. 583, 587. *In re* Chetwood, 165 U. S. 443, 462. *In re* Debs, 158 U. S. 564, 573. Hayes *vs.* Fischer, 102 U. S. 121. We insist that the trial court was absolutely without jurisdiction of the alleged offense in this case.

Our petition could not have been filed here at the last term, because this court adjourned on May 28, 1906, while the Court of Appeals did not decide our motion for a rehearing until June 7, 1906; and we are therefore in due time. The Conqueror, 166 U. S. 110, 114.

If this case has been improperly brought up by the writ of error to the Court of Appeals D. C., this court should grant the writ of certiorari to said court, and in such case the copy of the record filed under the writ of error should be directed to be taken and deemed a sufficient return to the certiorari. Security Trust Co. *vs.* Dent, 187 U. S. 237, 239. Whitney *vs.* Dick, 202 U. S. 132, 134.

The practice of submitting the petition for certiorari on the hearing of the writ of error or appeal was followed and approved in Security Trust Co. *vs.* Dent, *supra*, and Burton *vs.* United States, 196 U. S. 284, 295.

The consideration that this judgment is conclusive (United States *vs.* Three Copper Stills, 47 Fed. Rep. 495), of the petitioner's absolute forfeiture to the United States of "all right or claim to any commissions, costs, and charges," amounting to $10,070.82 (R. 36), also affords a powerful reason why the writ of certiorari should issue.

If the writ of error does not lie, the writ of ***habeas corpus*** from this court does, as the trial court was without jurisdiction, for the reasons stated in our petition for certiorari; and this furnishes an additional reason why the broad writ of certiorari under the statute should issue in preference to the narrower writ of ***habeas corpus***.

We endeavor elsewhere to show that this court has jurisdiction on the writ of error; but if we be wrong in this, then we earnestly ask that the writ of certiorari may go, and that the record filed under

the writ of error may be ordered to stand as the return to the certiorari.

Respectfully submitted,

HENRY E. DAVIS,
JOHN C. GITTINGS,
FRANK J. HOGAN,
Attorneys for Petitioner.

Washington, D. C., October 13, 1906.

[NOTE.—Since the foregoing petition was filed on October 16, 1906, the record returned under the writ of error in this case has been fully printed, and the opinion of the Court of Appeals has been officially reported in 27 App. D. C. 433. Additional references have, therefore, been added in brackets].